(1)

Supreme Court, U.S.
FILED
JAN 10 1992
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91-1141

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

A 1985 CADILLAC FLEETWOOD, VIN #1G6CB6989F4299723; A 1989 SUZUKI MOTORCYCLE, VIN #JS1GR77A2J2100937;

ROBYN PRICE AND ROBERT CARTER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI To The United States Court Of Appeals For The Sixth Circuit

---

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER IN A CIVIL FORFEITURE CASE WHERE THE GOVERNMENT, HAVING SUBJECTED ITSELF TO *IN PERSONAM* JURISDICTION, WOULD LACK THE POWER TO DEFEAT A CLAIMANT'S RIGHT TO APPEAL BY SIMPLY REMOVING THE PROPERTY INVOLVED FROM THE JURISDICTION OF THE COURT.

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NO. _____

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UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI To The United States Court Of Appeals For The Sixth Circuit

---

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioners, Robyn Price and

Robert Carter, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which judgment became final on September 12, 1991, when the Court affirmed the District Court's decision.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Opinion of the Court of Appeals dismissing the appeal of the judgment forfeiting the property involved in this cause was filed on September 12, 1991. An Application For Extension Of Time was filed with this Court and granted, making the Petition For Writ due on January 10, 1992 (see Appendix "B", infra, p. A 5).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are:

(1) 21 U.S.C. §881(a)(6);

(2) Rule 56(c) and (e), Federal Rules of Civil Procedure.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is set forth in the Appendix, infra, p. A 1. The Memorandum and Order rendered by the trial Court is unreported but is attached here under the designation Appendix "C", infra, p. A 5.

STATEMENT OF THE CASE[1]

Based on various pleadings filed in this cause,[2] in which the government sought the forfeiture of the 1985 Cadillac Fleetwood (hereinafter, the Cadillac) and the 1989 Suzuki 750CC Motorcycle (referred to herein as the Motorcycle), the Court entered herein, on February 27, 1991, its Order granting Summary Judgment to the government. This judgment forfeited, both, the Cadillac and the Motorcycle to the government.

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[1] References to the Appendix to this Petition are designated Appendix " ", p. A ___.

[2] These include the Complaint in Forfeiture, the Claims and Answers filed by Robyn Price and Robert Carter, the Motion For Summary Judgment, the Response filed by the claimants, the Government's Reply thereto and the Court's Judgment Entry, granting Summary Judgment, the Order being appealed herein.

An appeal was seasonably lodged by the claimants, Robyn Price (Cadillac) and Robert Carter (Motorcycle) from the Court's Order. The Court of Appeals dismissed the appeal for the reasons stated in its Opinion (see Appendix "A," infra, p. A 1).

In its Motion for Summary Judgment the government set forth a rather routine factual scenario. It was conceded that the petitioners, Robert Carter and Robyn Price, filed claims and answers asserting an interest in the defendant motorcycle and cadillac.

Next, the government contended that its evidence established that Michael Alexander, whose home was illegally searched as the District

Court had originally determined (See United States of America v. Michael Alexander, 740 F. Supp. 437 [N.D. of Ohio, 1990]), had purchased the Cadillac and the Motorcycle with proceeds from drug sales and had concealed his ownership of these vehicles in the names of these claimants.

The government's proof as to Michael Alexander was that he lacked a sufficient income to justify his purchase of the Cadillac and the Motorcycle, hence the inference was inescapable he had to have used drug money to make these purchases. This contention the government made despite conceding that Carter, one of our petitioners, did in fact pay for the Motorcycle.

With reference to the Cadillac, the government fully admitted it was purchased by our petitioner, Robyn Price. The government also made the contention that Robyn Price lacked the funds to make the purchase and that in fact the funds were provided by Michael Alexander.

The District Court aptly phrased the central issue before it in the following quote from the Claimant's Response, pp. 1-2. Here the Court stated:

"The claimants only response to the motion for summary judgment is as follows:

> 'This being so, there is surely an issue here as to (1) whether, given the fact that this Court has already concluded (in United States v. Alexander, [740 F. Supp. 437 (N.D. Ohio, 1990)] that the search made of Alexander's home was illegal, the Government is

> estopped by that judgment from arguing that the officers' discovery of the property here involved on the basis of documents and the like found on Alexander's premises could be a valid predicate for seizure.'

Claimants' response at pp. 1-2."

Memorandum and Order - Judge Ann Aldrich, at p. 5, Appendix "C", infra, p. A 16.

The District Court, in addressing this issue, then credited her ruling in United States v. Alexander, 740 F. Supp. 437 (N.D. Ohio 1990), in which she had held that the search of Alexander's wallet was legal (id., at 443). The Court, based on this asserted fact, then simply jumped to the conclusion that the search of the wallet yielded the information relied on and credited this asserted fact as

being the basis for the seizures actually made.

Aside from the fact that the search of Alexander's wallet may or may not have been legal, a question still existed as to whether in fact the seizures of these vehicles, as distinguished from the search made of the premises where they were stored, were legal. This, of course, is an issue that is not easily resolved.

Indeed, while the statement relied on by the Court that some convenient informant told Agent Bloomstein that Michael Alexander owned a Cadillac and a Motorcycle, the fact that this informant more probable than not was one of the officers who had illegally searched Alexander's home and come to that conclusion

should not have been excluded as a possibility. Indeed, it should be emphasized that Agent Bloomstein himself does not make the claim that this possibly phantom informant was reliable.

On appeal, without any apparent hesitation, the Sixth Circuit (because it was shown that the property involved in the forfeiture had been removed from the control of the Court) summarily dismissed the appeal. Specifically the Sixth Circuit relied on two Opinions, cf., **United States v. $84,740.00 in U.S. Currency**, 900 F.2d 1402 (9th Cir. 1990) and **United States v. One Lear Jet Aircraft**, 836 F.2d 1571 (11th Cir.) cert. denied, 487 U.S. 1204 (1988). See Opinion, Appendix "A", infra, p. A 3.

ARGUMENTS RELIED ON FOR

ALLOWANCE OF WRIT

Granted the Opinion rendered by the Sixth Circuit, and from which this appeal is raised, clearly puts the Sixth Circuit in the same camp as the Ninth and Eleventh Circuits. However, it is, or should be, a matter of serious concern to the Court that there is an obvious conflict in the positions taken in the various Circuit Courts that have addressed the dispositive issue in this case. Because this conflict does exist, clearly this case presents the Court with an apt and timely opportunity to declare whether the view taken by the Second Circuit in **United States v. Aiello**, 912 F.2d 4 (2d Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. ___

(1991); the Fourth Circuit in **United States v. $95,945.18, U.S. Currency**, 913 F.2d 1106, 1109 (4th Cir. 1990); and the First Circuit in **United States v. One Lot of $25,721.00 In Currency**, 938 F.2d 1417 (1st Cir. 1991), present the better view and should be adopted by the Court. As to the cases in this latter group, it should be noted they clearly and expressly adopt the view of the dissenters in **One Lear Jet**. The fact that **One Lear Jet** was a six to five decision, truly put the issue here in a critical light.

ARGUMENT NO. I

In A Civil Forfeiture Case, Where The Government Subjects Itself To *In Personam* Jurisdiction, The Government Lacks The Power To Defeat A Claimant's Right To Appeal By Simply Removing The Property Involved From The Jurisdiction Of The Court.

The arguments in favor of the proposition here being urged were well stated by Judges Vance and Clark in their dissents recorded in **United States v. One Lear Jet Aircraft, 836 F.2d 1571 (11th Cir. 1988)** and expressly adopted as the law in the Second, Fourth and First Circuits.

The upshot of these opinions and

the position here being urged is "that the time has come to jettison the 'no res, no jurisdiction' rule" (**United States v. One Lot of $25,721.00 In Currency**, **948 F.2d, at 1419**). We also agree that "[t]here is no good reason why the government should be allowed to insulate itself from appellate review ...." (id., at 1420).

While the First Circuit was admittedly writing in the context of a forfeiture case involving money only, such was not the case in **One Lear Jet** or **Aiello**, the Fifth and Second Circuit cases upon which we rely for our basic thesis.

That thesis (as simply stated in **Aiello**, in its express adoption of the position taken by Judge Vance) is that "the Government having submitted

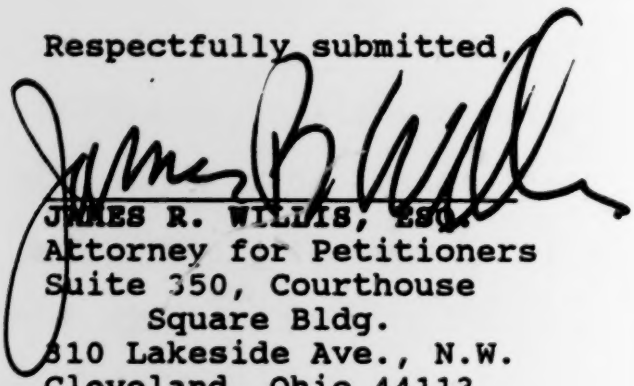
itself to the jurisdiction of the Court ... should not be allowed to escape appellate review of the judgment it has obtained." Id., p. 7, citing **United States v. One Lear Jet, 836 F.2d, 1579 (11th Cir. 1988)**. The appellants here take that same position and urge the Court to likewise do so.

CONCLUSION

As shown by reference made to the conflict between the Courts on the fundamental question here, clearly this cause merits the attention of this Court. Indeed certiorari should be granted to the end that this

conflict can be resolved in favor of due process.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ Of Certiorari was mailed to the office of Kathleen L. Midian, Assistant United States Attorney, 1404 East Ninth Street, Suite 500, Cleveland, Ohio 44114; and the Solicitor General, Department of Justice, Washington, D.C. 20530, this 10th day of January, 1992.

JAMES R. WILLIS, ESQ.
Attorney for Petitioners

APPENDIX

NO. 91-3388
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	O R D E R
	)	
A 1985 CADILLAC FLEETWOOD, VIN #1G6CB6989F4299723; A 1989 SUZUKI MOTORCYCLE, VIN #JS1GR77A2J2100937,	)	
	)	
Defendants-Appellants,	)	
	)	
ROBYN PRICE; ROBERT CARTER,	)	
	)	
Claimants-Appellants.	)	

BEFORE: GUY, Circuit Judge; PECK, Senior Circuit Judge; and SILER, Chief District Judge[1].

Claimants Robyn Price and Robert Carter appeal the summary judgment

---

[1] The Honorable Eugene E. Siler, Jr., Chief U.S. District Judge for the Eastern District of Kentucky, sitting by designation.

entered in this civil forfeiture action ordering that the defendant automobile and the defendant motorcycle be forfeited to the government pursuant to 21 U.S.C. §881(a)(6). The government moves to dismiss the appeal on the grounds that the automobile has been transferred to the Internal Revenue Service and the motorcycle has been sold, thus depriving this court of subject matter jurisdiction. Claimants have not responded to the motion to dismiss.

Civil forfeiture proceedings are in rem proceedings and the court's subject matter jurisdiction is dependent on its continued control over the property. United States v. $84,740.00 U.S. Currency, 900 F.2d 1402, 1404 (9th Cir. 1990); United

States v. Tit's Cocktail Lounge, 873 F.2d 141, 143 (7th Cir. 1989) (per curiam). The release or removal of the property from the control of the court will terminate subject matter jurisdiction, unless the property is released accidentally, fraudulently, or improperly. United States v. $84,740.00 U.S. Currency, 900 F.2d 1404; United States v. One Lear Jet Aircraft, Etc., 836 F.2d 1571, 1574 n. 2 (11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988). Upon review, we conclude that this court's jurisdiction over the appeal terminated with the transfer of the defendant vehicles from the control of the court.

It therefore is ORDERED that the motion to dismiss is granted and this

appeal is dismissed for lack of subject matter jurisdiction.

ENTERED BY ORDER OF THE COURT

_____

CLERK

SUPREME COURT OF THE UNITED STATES

No. A-419

Robyn Price and Robert Carter,

Petitioners

v.

United States

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 10, 1992.

/S/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Dated this 12th day of December, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. 1:90CV1416
Plaintiff,	)	
	)	O R D E R
vs.	)	
A 1985 CADILLAC FLEETWOOD, etc., et al.,	)	
Defendants.	)	

ALDRICH, J.

The Court has filed its memorandum and order granting the United States' motion for summary judgment; therefore,

IT IS ORDERED that judgment is entered in favor of the United States; and that the 1985 Cadillac Fleetwood, VIN #1G6CB6989F4299723, and the 1989 Suzuki, VIN #JS1GR77A2J2100937, are forfeited to the United States.

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CASE NO.1:90CV1416
vs.	MEMORANDUM & ORDER
A 1985 CADILLAC FLEETWOOD, etc., et al., Defendants.	

ALDRICH, J.

The United States has brought this civil forfeiture action pursuant to 21 U.S.C. §881(a)(6) against a 1985 Cadillac is held by Robyn Price and the title to the motorcycle is held by Robert Carter. Both Price and Carter have filed claims and seek to contest the forfeiture. The United States has filed a motion for summary judgment. Although the claimants' response is

untimely, the Court will address, on their merits, the arguments raised. For the reasons set forth, the Court grants the United States' motion for summary judgment.

I.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...

The nature of materials properly presented in a summary judgment pleading is set forth in Federal Rule of Civil Procedure 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of

proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories and admissions on file. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In a forfeiture action, once the government has established probable cause to believe that the property is subject to forfeiture, the claimant cannot rest on bare legal title to the property. United States v. 526 Liscum, 866 F.2d 213, 217 (6th Cir. 1988). The claimant must present evidence of dominion and control over the subject property. Id.

II.

The government has introduced evidence demonstrating that the motorcycle and the Cadillac at issue

in this case were purchased by Michael Alexander with proceeds from his illegal drug trafficking operation.

The government's evidence establishes that from January 1985 to December 1989, Alexander had no known legitimate source of income except for $131.00 he received from Hours Incorporated National. He filed no tax returns for those years. At the time of his arrest, in December 1989, Alexander was carrying close to a kilogram of cocaine, a pager and $1,260.00. He was charged, and on July 19, 1990, plead guilty to Count I of an indictment charging him with possession with intent to distribute. United States v. Alexander, 90CR0007 (N.D. Ohio, Aldrich, J.).

Agent Bloomstine, in his

affidavit, states that an informant had told him that Alexander owned a blue Cadillac with gold trim (defendant vehicle) and a motorcycle. After Alexander was arrested, Bloomstine met with members of the Cleveland Police Narcotics Unit. He examined the contents of Alexander's wallet which contained a receipt from the Marsol Towers Apartments and a magnetic key card. Bloomstine went to Marsol Towers where the management informed him that Alexander rented two garage spaces. Neither Alexander, Carter, nor Price were tenants at Marsol Towers. Bloomstine asked for and was given permission to enter the garage and examine the spaces rented by Alexander. He observed a 1985 Blue Cadillac Fleetwood with gold trim and

a 1989 Suzuki motorcycle. Bloomstine inserted the key card into the key card lock and the card did open the automatic door. The motorcycle was purchased in July 1989 from Brunswick Suzuki by Robert Carter. He and Alexander went to the dealership where Alexander selected the motorcycle and Carter paid for it with $6,080.00 in currency. Later, Alexander brought the motorcycle to the dealership for servicing. Alexander is licensed to drive a motorcycle but Robert Carter is not so licensed.

Robyn Price, Alexander's cousin, holds title to the Cadillac. It was purchased on June 21, 1988, for $14,175.00 in the form of a $6,000.00 bank check and $8,175.00 in currency. In 1989, Alexander authorized the

installation of a sound system and also paid $2,000.00 for the installation of a customized roof.

In January 1990, Price stated that the automobile was purchased in 1987, and custom features had been added by an individual who lived in Georgia. She could not describe the sound system nor the customized roof, nor could she give the approximate mileage. In addition, the car was not insured in her name, and she stated that she had purchased the car with money she had saved at her residence, not in a bank.

In 1986, 1987, and 1988, Price's tax returns showed taxable income of $7,460.00, $7242.78 and $5,7921.00, respectively.

Both Price and Carter have

refused to answer the interrogatories propounded by the government. Price and Carter both asserted their fifth amendment privilege against self incrimination, even to questions relating to their names, and addresses.

III.

The claimants only response to the motion for summary judgment is as follows:

> This being so, there is surely an issue here as to (1) whether, given the fact that this Court has already concluded (in United States v. Alexander, Case No. 1:90CR0007) that the search made of Alexander's home was illegal, the Government is estopped by that judgment from arguing that the officers' discovery of the property here involved on the basis of documents and the like found on Alexander's premises could be a valid predicate for seizure.

Claimants' response at pp. 1-2.

This issue is easily resolved. The defendant vehicles were not discovered through information obtained from the illegal search of Alexander's home. The vehicles were discovered through information obtained from the search of Alexander's wallet. See, Bloomstine's affidavit, ¶5. This Court has previously ruled that the search of the wallet was legal. U.S. v. Alexander, 740 F. Supp. 437, 443 (N.D. Ohio 1990). Accordingly, the Court finds the claimants' argument regarding the legality of seizure to be without merit.

The only issue to be resolved then, is whether the government has established probable cause to believe

that the vehicles are subject for forfeiture. The government must establish a reasonable ground to believe that there is a substantial connection between the property to be forfeited and illegal narcotics activity. 526 Liscum, 866 F.2d at 216.

The government has presented ample evidence from which this Court finds probable cause. The evidence demonstrates that Alexander, and only Alexander, exercised any control over the two vehicles. The evidence also demonstrates that he participated in the purchase and maintenance of the vehicles and that both were purchased using large sums of currency and bank checks. The use of large sums of currency for purchases is common among

narcotics dealers. Robyn Price's income is inadequate to support the purchase of the car and she knew little is anything about the car. In fact, when interviewed, she did not even know that the car had been seized. In addition, Robert Carter is not authorized to operate a motorcycle.

Alexander has no legitimate source of income. His only apparent source of money is from the sale of narcotics. Alexander exercised control over both vehicles and was present, with cash, when they were purchased. Neither claimant has produced any evidence in support of their claims of ownership. Bare legal

title[2] is not sufficient to contest a forfeiture once the government has established probable cause.

In conclusion, then, the Court finds that the government's motion for summary judgment is well taken. The 1985 Cadillac Fleetwood, VIN #1G6CB6989F4299723 and the 1989 Suzuki, VIN #JSIGR77A2J2100937 are forfeited to the United States.

IT IS SO ORDERED.

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

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[2] The government's statement at pg. 2 of its memorandum, mischaracterizes this Court's opinion of December 6, 1990. This Court found that legal title conferred sufficient standing under Article III to require the government to show probable cause.

Supreme Court, U.S.
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(2)

No. 91-1141

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBYN PRICE AND ROBERT CARTER, PETITONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction over an appeal from an *in rem* forfeiture proceeding after the *res* was removed from the court's jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1141

ROBYN PRICE AND ROBERT CARTER, PETITONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A4) and the district court (Pet. App. A6-A20) are unreported.

JURISDICTION

The judgment of the court of appeals was filed on September 12, 1991. On December 12, 1991, Justice Stevens extended the time in which to file a petition for a writ of certiorari to and including January 10, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 6, 1990, the United States filed an *in rem* action in the United States District Court for the Northern District of Ohio seeking forfeiture of a 1985 Cadillac Fleetwood automobile and a 1989 Suzuki motorcycle. The complaint alleged that the vehicles were subject to forfeiture under 21 U.S.C. 881(a)(6) because they had been purchased with the proceeds of an exchange of controlled substances. The complaint alleged that the vehicles belonged to Michael Alexander, although title to the vehicles was held in the names of petitioners Robyn Price and Robert Carter. On July 20, 1990, according to the complaint, Alexander pleaded guilty to a single count of possession of approximately 720 grams of cocaine with the intent to distribute it.

Price and Carter filed claims to the defendant properties, and the government filed a motion for summary judgment. Pet. App. A8. In support of its motion, the government introduced evidence showing that between January 1985 and December 1989, Alexander had no legitimate source of income. In July 1989, Alexander went to a motorcycle dealership with petitioner Carter and selected the defendant motorcycle. Later, Alexander brought the motorcycle back to the dealership for servicing. Alexander is licensed to drive a motorcycle, but Carter is not. Pet. App. A12, A14.

The defendant Cadillac, to which petitioner Price, Alexander's cousin, held title, was purchased on June 21, 1988, with $8,175 in cash and a $6,000 bank check. In 1989, Alexander authorized the installation of a sound system. He also paid $2,000 for installation of a customized roof. Price was unable to describe the car, and it was not insured in her name. Although Price claimed to have paid for the Cadillac with her savings,

her tax returns for 1986, 1987, and 1988 showed a total taxable income for all three years of less than $25,000. Pet. App. A14-A15. Both the Cadillac and the motorcycle were found in parking spaces rented by Alexander. Pet. App. A13-A14.

2. On February 27, 1991, the district court granted the government's motion for summary judgment. Pet. App. A8-A20. The court found that the government had presented "ample evidence" to show probable cause to believe that the defendant vehicles were purchased with the proceeds of illegal narcotics activity. Pet. App. A18. The court found that Alexander exercised control over the vehicles, that Price's income and Carter's lack of a license for a motorcycle made it unlikely that they owned the vehicles, and that Alexander's only apparent source of income "is from the sale of narcotics." Pet. App. A18-A19. In addition, the court noted that "[n]either claimant has produced any evidence in support of their claims of ownership." Pet. App. A19.

Petitioners Price and Carter filed a notice of appeal, but they failed to seek a stay of the district court's order or to file a supersedeas bond. On March 22, 1991, the United States Marshal transferred the Cadillac Fleetwood to the Internal Revenue Service. On July 11, 1991, the Marshal sold the motorcycle for $2,900. Pet. App. A2.

3. On the government's motion, the court of appeals dismissed the claimants' appeal. Pet. App. A1-A4. The court held that "[c]ivil forfeiture proceedings are *in rem* proceedings and the court's subject matter jurisdiction is dependent on its continued control over the property." Pet. App. A2. The court concluded that its "jurisdiction over the appeal terminated with the transfer of the defendant vehicles from the control of the court." Pet. App. A3.

ARGUMENT

Petitioners contend (Pet. 11-15) that the court of appeals erred in dismissing their appeal from the district court's final judgment of forfeiture. Petitioners point to a conflict in the courts of appeals over whether removal of the *res* from the jurisdiction of the court deprives the court of jurisdiction in an *in rem* forfeiture proceeding.

On February 24, 1992, this Court granted certiorari in *Republic National Bank* v. *United States*, No. 91-767. That case presents the question whether removal of the *res* from the district in an *in rem* forfeiture proceeding deprives the court of appeals of jurisdiction. In *Republic National Bank*, the government filed an *in rem* action seeking the forfeiture of a single-family residence. While the case was pending in the district court, the house was sold and the proceeds were deposited with the United States Marshal. Following a bench trial, the district court issued a final judgment of forfeiture. The claimant appealed, but failed to file a supersedeas bond or seek a stay of the district court's judgment. The United States Marshal then transferred the proceeds of the sale of the house into the Asset Forfeiture Account of the United States Treasury. Because the *res* had left the court's territorial jurisdiction, the court of appeals dismissed the appeal.*

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* In addition to the court of appeals in this case, the Seventh, Ninth, and Eleventh Circuits adhere to the view that the presence of the *res* is a prerequisite to jurisdiction. See *United States* v. *$29,959*, 931 F.2d 549, 551 (9th Cir. 1991); *United States* v. *$10,000*, 860 F.2d 1511, 1513 (9th Cir. 1988); *United States* v. *Tit's Cocktail Lounge*, 873 F.2d 141, 143 (7th Cir. 1989); *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988) Four courts of appeals take the view that even after the departure of the *res* from the jurisdiction of the court, the

The *res* at issue in *Republic National Bank* was sold and the proceeds were deposited with the Marshal while the case was pending in the district court. Thus, the precise question presented in *Republic National Bank* is whether the transfer of money from the district where forfeiture was sought to the United States Treasury deprives the court of *in rem* jurisdiction. In this case, in contrast, the *res* at issue are vehicles rather than money. At least one court of appeals has suggested that this difference may affect the jurisdictional analysis. See *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991). In addition, at least one of the vehicles at issue in this case has been sold and has passed out of the control of the government. Consequently, even if the petitioner were to prevail in *Republic National Bank*, it is possible that the petitioners in this case would be entitled to no relief.

Despite these differences, the Court's decision in *Republic National Bank* may well have a bearing on this case. We therefore suggest that the Court hold the petition for a writ of certiorari in this case pending its decision in *Republic National Bank*.

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court retains *in personam* jurisdiction over the government and thus may order the government to return forfeited funds. *United States* v. *Aiello*, 912 F.2d 4, 7 (2d Cir.), cert. denied, 111 S. Ct. 757 (1990); *United States* v. *$95,945.18*, 913 F.2d 1106, 1109 (4th Cir. 1990); *United States* v. *$25,721.00*, 938 F.2d 1417, 1419 (1st Cir. 1991); *United States* v. *$12,390*, No. 90-2071 (8th Cir. Feb. 10, 1992). See also *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991) (declining to apply the rule that the departure of the *res* from the jurisdiction of the court deprives the court of jurisdiction when the *res* is money).

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Republic National Bank* v. *United States*, cert. granted, No. 91-767 (Feb. 24, 1992), and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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